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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLIFTON M. McCLURE,
Petitioner,

v.

UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The Court has ruled that antitrust treble-damage plaintiffs who have proved a violation are excused from an unduly rigorous standard of proving antitrust injury. The principal prerequisite to a finding of injury is that the nature of the violation proved would have had a tendency to cause the plaintiff's loss. Having established this probable causal connection, the plaintiff need only put on sufficient evidence tending to show a reasonable estimate of his loss of profits. The defendant bears the burden of proving that the loss was wholly attributable to other causes. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.* 327 U.S. 251 (1946). The courts of appeals are divided on the issue of proper application of this rule in cases involving concerted refusals to deal under Section 1 of the Sherman Act.

Question 1. Does a treble-damage antitrust plaintiff satisfy his burden of proof of impact by showing a concerted refusal to deal with him and a decline in sales and profits not entirely attributable to other causes or, as the court below held, does he have the additional burden to prove such a negative as a lack of alternative supply?

Question 2. In reviewing a jury verdict favorable to a treble-damage plaintiff, does a reviewing court have a duty to find the fact of violation as a necessary predicate to finding impact, or, might a reviewing court, as did the court below, determine, in isolation, only fact of impact?

It is axiomatic that in reviewing a favorable judgment, courts must view the record and reasonable inferences to be drawn from it in a light most favorable to the verdict-winner. *See Galloway v. United States*, 319 U.S. 372 (1943). There is division among the courts of appeals,

however, on the question of which portion of the evidence a court is to consider. *Schwimmer v. Sony Corp. of America*, —— U.S. ——, 103 S.Ct. ——, 1089 ATRR 906 (Nov. 8, 1982) (White, J. dissenting from denial of certiorari.)

Question 3. In reviewing a jury verdict favorable to a treble-damage plaintiff, does a reviewing court have an obligation to give the plaintiff the full benefit of all his proof and consider only the evidence that supports the plaintiff?

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CLIFTON M. McCLURE,

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UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Clifton M. McClure, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 1a-8a) is reported at 671 F.2d 1287. The *per curiam* opinion of the court of appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Pet. App. B, *infra*, pp. 9a-11a) is reported at —— F.2d ——, 1982-2 Trade Cases ¶ 64,940.

JURISDICTION

The judgment of the court of appeals reversing the district court's judgment and order denying respondent's motion for judgment notwithstanding the verdict (Pet. Apps. C and D, *infra*, pp. 12a and 13a-14a) was entered on March 29, 1982. A timely petition for rehearing and

suggestion for rehearing *en banc* was filed by petitioner and denied in a *per curiam* opinion of the court of appeals on September 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

Scuba diving is a growing recreational activity in the United States. A Scuba diver's outfit, similar to a skier's, consists of several pieces of equipment, each of which serves a discrete purpose. The equipment includes regulators, fins, tanks, valves, gauges, face masks, flotation vests, snorkels, wetsuits and other diving apparel. Although there are approximately seventy scuba diving equipment manufacturers, the industry is highly concentrated. The five leading full-line manufacturers account for some 73.2 percent of sales. (T.R. 2357)[1] Of these five,

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[1] "T.R." refers to the trial record in the district court.

the respondent,[2] whose products are marketed under the Scubapro brand name, ranks second. Among scuba divers, the Scubapro brand name has acquired substantial goodwill, owing to the equipment's well-deserved reputation for superior quality and product design. (T.R. 2326-2329)

During the relevant period, the respondent marketed Scubapro equipment through a network of franchised dealers located throughout the United States. These dealers, about 500 in number, were all professional diving shops. The respondent refused to market Scubapro equipment through discount department stores and mail order houses.

In 1969, McClure became an authorized dealer in Huntsville, Alabama when he signed the Statement of Mutual Agreement Between Scubapro and Authorized Scubapro Dealers. (Pet. App. E, *infra*) As such, McClure carried a wide assortment of Scubapro diving equipment including the items referred to above and, additionally, replacement parts for repair of certain items. Following a period of alleged declining purchases of Scubapro equipment and rising purchases of other brands of scuba diving equipment, McClure lost his Scubapro franchise on June 9, 1977. (App. A, p. 2a)

After his Scubapro franchise had been terminated, McClure remained a scuba diving equipment dealer. He placed orders with the respondent for replacement parts and other equipment. These orders were never acknowledged.[3] Although McClure acquired some Scubapro equipment from authorized dealers with whom he had enjoyed

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[2] The respondent is a wholly-owned subsidiary of Johnson Wax Associates, Inc., Racine, Wisconsin, successor-in-interest to Johnson Diversified, Inc. which was voluntarily dismissed from the complaint.

[3] Respondent's chief executive, Richard Bonin, admitted these orders were received but respondent refused to acknowledge them because petitioner was no longer an authorized dealer. (T.R. 3078, 3092, 276)

a previous professional relationship,[4] in December 1977 and January 1978, McClure contacted several authorized dealers who refused to sell to him. Thereafter, on February 2, 1978, McClure filed this lawsuit against the respondent. (App. A, p. 2a)

The complaint, filed under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleged that the respondent (1) terminated McClure's dealership as part of a conspiracy to restrain trade, prevent competition and an attempt to monopolize trade in scuba diving equipment in violation of Sections 1 and 2 of the Sherman Act; (2) engaged in a conspiracy to restrain trade by fixing resale prices; and (3) engaged in a conspiracy with authorized dealers to boycott McClure by refusing to deal with him after his termination. (App. A, pp. 2a-3a) At the trial, which began on February 4, 1980, McClure offered proof that the respondent and authorized dealers had agreed to fix retail prices of Scubapro equipment and to maintain control of such prices by barring transshipment of Scubapro equipment from authorized dealers to unauthorized dealers. (App. E, pp. 15a-18a)[5] McClure also offered evidence showing enforcement of this agreement. The principal proof of enforcement was dealer testimony concerning surveillance and "shopping" of dealers who were suspected of discounting and the tracing of serial numbers of warrantied Scubapro equipment back to dealers who had been suspected of transshipping such equipment to unauthorized dealers.[6] Finally, McClure offered proof

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[4] Petitioner had been active in scuba diving instruction clinics and other industry activities where he became friendly with some Scubapro dealers. (T.R. 667-668)

[5] For example, former dealer Stenchfield testified that respondent's policies toward dealers had always been the same, that is "no discounting, no transshipments and you pay the consequences for it." (T.R. 1461) Former dealer Shuler testified that respondent did not want transshipment between an authorized dealer and an unauthorized dealer; respondent controlled the prices. (T.R. 2301)

[6] Dealer Ashburn testified that he had shopped Mr. Shuler's store, bought some Scubapro equipment and transmitted the serial number

that the respondent threatened to and in some cases actually did terminate authorized dealers who had discounted Scubapro equipment or had transshipped it to unauthorized dealers. (T.R. 1101-1102, 1357, 1458, 2275, 2298)

The respondent countered with proof that, despite the alleged boycott, four authorized dealers had sold Scubapro equipment to McClure after his termination at prices and terms of delivery equal to respondent's. (App. A, pp. 6a-7a)[7] In addition, the respondent offered deposition testimony of certain authorized dealers that they would have sold additional Scubapro equipment to McClure if he had asked. (App. A, p. 7a) However, the respondent put on no evidence to substantiate the fact that those dealers could or would have filled McClure's orders during the period when several authorized dealers refused to sell to him. On the other side, McClure did offer direct and circumstantial evidence that, as a result of the group boycott (1) several authorized dealers refused to deal with McClure and other unauthorized Scubapro dealers, (App. A, p. 2a; T.R. 860, 1101-1104, 1106) (2) shipments of Scubapro equipment in quantities sufficient to meet McClure's demand had been restricted,[8] (3) timely shipment

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to respondent who used it to trace the equipment to former dealer Dale Stone who had been transshipping it to Mr. Shuler. Stone was terminated by respondent for this activity. (T.R. 2273-2275) Respondent's Mr. Bonin admitted that he had traced serial numbers on equipment sold by unauthorized dealers. (T.R. 1637-1639)

[7] The court below found it significant that petitioner had purchased more Scubapro equipment in the latter half of 1977, after termination, than he had in the first four months of 1977. The court apparently was unmindful that scuba diving is a seasonal sport. Respondent's Mr. Bonin admitted, however, that January through March are certainly not as good for scuba diving as the Summer. (T.R. 1754-1755)

[8] Petitioner's wife, who participated in petitioner's business, testified that petitioner was limited by what the dealers who defied the boycott had in stock; that none of them stocked enough to fulfill petitioner's needs. (T.R. 1312, 1314)

of Scubapro replacement parts had been impeded, (T.R. 329, 2526) (4) the danger that serial-numbered equipment such as regulators would be traced back to the originating dealer and his franchise terminated prevented substantial purchases or resales of such equipment by unauthorized dealers,[9] and (5) McClure's sales and profits from the sale of Scubapro equipment declined severely by comparison with previous periods. (T.R. 304-438) Except for proffering evidence aimed at showing it had not engaged in a group boycott, the respondent made no attempt to prove that McClure's loss of sales and profits was attributable to unrelated causes such as mismanagement. Rather, the respondent attempted to show that McClure's overall performance had improved after termination.

After the close of McClure's evidence, the district court directed a verdict against McClure on the attempted monopolization, dealer termination and price fixing causes of action, the latter because McClure had failed to prove fact of injury. (App. A, p. 4a-5a) The respondent's motion for directed verdict on the boycott conspiracy claim was denied, and the case went to the jury on this claim only.

The district court properly instructed the jury as to the nature of the group boycott violation it must find; that the jury also must be satisfied by a preponderance of the evidence that the alleged conspiracy was material in causing concrete and determinable injury to McClure's business; and further that McClure must provide some indication of the amount of damage already done. (App. A, p. 6a) The jury returned a verdict in favor of McClure for $20,000 single damages, far less than the $902,000

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[9] See footnotes 5 and 6, *supra*. Former dealer Stone testified that after his termination, a Scubapro dealer in Savannah, Georgia sold him serial-numbered equipment but Stone did not resell it because he "didn't want to get him axed." (T.R. 2291) Petitioner and Mrs. McClure also referred to the same problem. (T.R. 296, 1314)

damages he had requested. (T.R. 2388) After trebling the damages, the district court also awarded McClure attorney's fees and costs of $85,000.

The court of appeals unanimously reversed the jury verdict for McClure. The court acknowledged that almost immediately prior to filing suit, McClure had contacted several dealers who refused to sell to him. (App. A, p. 2a) In the court's view, however, evidence that McClure had neglected to contact other dealers who earlier had offered to sell him additional Scubapro equipment was fatal to his claim of injury. (App. A, p. 7a) The court concluded that there was an absence of evidence "other than McClure's and his wife's own allegations," to infer injury specifically from the alleged boycott. (App. A, p. 8a) Thus, the court held that McClure had failed to meet the requirement of Section 4 of the Clayton Act, that an antitrust plaintiff must prove, in addition to violation, the fact of damage and some indication of the amount of damage done.

REASONS FOR GRANTING THE PETITION

1. While the Court has developed the general standards of proof for establishing injury and damages in private antitrust litigation, *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), it has yet to decide whether, in order to prove the fact of injury (impact), a plaintiff in a market exclusion case must additionally bear the burden of proof that despite evidence of repeated refusals (a) it also attempted to deal with alternative suppliers of comparable products *and* (b) its attempts to obtain comparable products in sufficient quantities were futile.

This issue is of signal importance because such an unduly rigorous standard undermines the relaxed proof of injury standard previously enunciated by the Court. Further, it is likely to give no small comfort to antitrust defendants in pending and future market exclusion cases. A requirement that the plaintiff disprove its ability to have dealt with all potential suppliers of comparable products will inevitably protract and increase the complexity of proof in treble damage antitrust cases. It will likely deter private litigants from bringing the very cases that Congress intended to deter antitrust violations. Beyond that, in cases involving products sold through large networks of franchised dealers or distributors, plaintiff's burden will become impossible to meet if it means showing that not one of hundreds of franchisees would deal with him. On the other side, the defendant will be encouraged to locate one or more docile franchisees to testify —after the fact—that "if the plaintiff had only called on me, I would have sold him anything he wanted to buy." In sum, the unduly rigorous standard applied by the court of appeals in this case will impede vigorous private enforcement of the antitrust laws by threatening to deprive the plaintiff of the treble damage incentive that counterbalances the difficulty of maintaining such expensive and time consuming litigation. *See American Society of Professional Engineers, Inc. v. Hydrolevel Corp.*, —— U.S. ——, 102 S.Ct. 1935, 1947 (1982).

Review is also merited because there is a conflict among the courts of appeals on this question. The Eighth Circuit has taken a position similar to that of the court below, holding that "[o]ne cannot show 'fact of injury' by alleging he did not receive something when he initially never tried to obtain it." *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 893-94 (8th Cir. 1979). These decisions conflict squarely with the Fifth Circuit's recent decision in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir.), *cert. denied*, 102 S.Ct. 975 (1981), holding that once the injured party has shown a con-

certed refusal to deal affecting him, the burden of proof shifts to the defendant who then bears the burden of disproving damages by establishing that alternative suppliers "could or would have sold [the plaintiff] the needed product in sufficient quantities . . . ." A similar approach has been adopted by the Fourth Circuit. Reversing a district court decision (1972-2 Trade Cases ¶ 62,886 (E.D. Va. 1979)) which had relied heavily on *Admiral Theatre Corp. v. Douglas Theatre Co., supra*, the Fourth Circuit held that from evidence of a concerted refusal to deal, the jury could infer that further efforts to acquire comparable products in sufficient quantities would have been futile. *Wilder Enterprises, Inc. v. Allied Artists Pictures*, 632 F.2d 1135, 1142 (4th Cir. 1980).

The conflict between the courts of appeals is a fundamental one, going to the very meaning of the term fact of injury. The court below and the Eighth Circuit implicitly hold the view that impact and amount of damage are inextricably bound together. In practical effect, these courts separate the analysis of violation from that of impact and damages. Thus, the nature, intent, and probable consequences of the antitrust violation are of minimal importance to their analysis of impact, the primary focus being upon the amount of damages suffered by the plaintiff. By contrast, the Fourth and Fifth Circuits' determination of fact of injury is closely intertwined with the nature, intent, and probable consequences of the antitrust violation. Thus, if the violation by natural consequence or intent aimed at a group of businessmen or consumers of which the plaintiff was a member, and he was hit (even slightly), his burden of proof of impact has been satisfied, and the analysis then turns to the amount of damages suffered by the plaintiff. Under this approach, the fact of injury and the amount of damage are mutually exclusive concepts. The fact of injury simply relates to a litigant's standing to sue.

Story Parchment Co. v. Paterson Parchment Paper Co., supra, is the first modern case in which the Court touched upon the fact of injury question in antitrust cases. In *Story Parchment* the defendants combined to monopolize trade in parchment paper by depressing prices of their products below the point of fair profit; indeed, below the cost of production. The Court held that "the natural and probable effect" of the antitrust violation was to "destroy normal prices," so that if earlier prices had been fair and reasonable a plaintiff could recover for the difference in price. 282 U.S. at 561.

The next case in which the Court addressed the injury question was *Bigelow v. RKO Radio Pictures, Inc., supra.* There, the plaintiff motion picture exhibitor established that certain motion picture distributors and exhibitors conspired to allow those exhibitors to secure feature pictures in advance of plaintiff and other independent exhibitors. The plaintiff contended that as a result of the conspiracy, it was prevented from securing pictures for exhibit in its theatre until after the preferred exhibitors had been able to show them in the earlier and more desirable runs, thereby discriminating against the plaintiff in favor of its competitors. The Court articulated the minimal showing necessary to show injury as follows:

> [I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their *tendency* to injure plaintiffs' business, and from the evidence of decline in prices, profits and values, not shown to be attributable to other causes, that, defendants' wrongful act had caused damage to the plaintiffs.

327 U.S. 251, 264 (1946) (emphasis added).

In *Bigelow,* the Court also intimated that the defendant has the burden of showing the injury was attributable to causes other than those asserted by the plaintiff. The decision strongly suggests that the principal prerequisite

to a finding of impact is that the nature of the violation proved would have had a natural tendency to create the circumstances leading to the plaintiff's loss of profits. Having established this probable causal connection, the plaintiff need only put on sufficient evidence tending to show his loss of profits. It then remains for the defendant to persuade the jury that the loss of profits was attributable entirely to a cause unrelated to the conspiracy.

Again in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, the Court had occasion to rely on the *Bigelow* language quoted above. 370 U.S. 690, 697 n.7. There the Court found "sufficient evidence for a jury to infer the necessary causal connection between" the plaintiff's business failure and a conspiracy controlling the supply of vital raw material. *Id.* at 700. Significantly, the Court countenanced the principle recognized by the Ninth Circuit in antitrust cases that "where the plaintiff proves a loss, and a violation . . . of such a nature as to be likely to cause that type of loss, . . . the jury . . . must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." *Id.* at 697.

The nature, intent, and probable consequences of an antitrust violation were also instrumental in showing impact in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*. Zenith proved that a Canadian patent pool refused to award licenses to importers. The purpose of the pool was to protect the Canadian manufacturers from competition by American and other foreign companies seeking to export their products into Canada. 395 U.S. 100, 115. As a result, Zenith was unable to obtain a license. Beyond that, the pool engaged in a vigorous campaign to discourage dealings with unlicensed foreign merchandise. Consequently, Zenith never made any headway in the Canadian market during the conspiracy period. *Id.* at 118. The Court concluded that Zenith's mere

inability to obtain a patent license had an impact on Zenith and constituted an injury to its business. *Id.* at 120. Making clear that proof of injury is only a threshhold inquiry before assessing damages the Court noted that: "[The plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. . . ." *Id.* at 114 n.9 (emphasis in original).

Recently, the Court discussed the impact requirement in antitrust cases in *J. Truett Payne Co. v. Chrysler Motors Corp., supra.* That case was instituted under Section 2(a) of the Robinson-Patman Act, an incipiency statute, requiring no showing of actual injury to competition to constitute a violation. The plaintiff sought automatic treble damages in the amount of the price discrimination. In rejecting automatic damages, the Court undertook a review of its earlier decisions with respect to the plaintiff's burden in establishing its right to damages in private antitrust litigaton. Implicitly, the principal concern in *Truett Payne* was that the paucity of evidence made it too difficult to determine whether the violation as alleged could reasonably have caused the damages claimed by the plaintiff. The court below had bypassed the question of whether the defendant had violated Section 2(a) so the Court was not prepared to consider the plaintiff's sparse evidence of damages. As the Court said:

> The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, however, we cannot say with assurance that respondent is a "wrongdoer." Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact

> violated § 2(a). Absent such a finding we decline to apply to this case the lenient damage rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

Id. at 1930.

The Court noted that in *Truett Payne* "the issue [was] not so much the amount of damages as whether petitioner ha[d] in fact been injured by an antitrust violation." *Id.* at 1930 n.5. Therefore, it is reasonable to assume that the Court refused to decide the damage question for two reasons. First, under its earlier rulings discussed above, the Court had reviewed the evidence of violation in order to decide whether from such evidence, the trier of fact could reasonably have inferred the causal connection between violation and injury. And, second, the rationale for relaxation of the burden of proving impact and damages would be lost if the defendant were not a wrongdoer. The dissent took issue with the majority's statement that the burden of proof of impact should be lenient, observing that "[o]nly when this fact [impact] has been proven may a court properly be lenient in the evidence it requires to prove the amount of damages." *Id.* at 1931 (citation omitted). However, this observation appears to have been prompted by recognition of the prophylactic nature of Section 2(a). As the dissent explained: "Section 2(a) is a prophylactic statute that makes unlawful price discrimination that 'may . . . lessen competition.' Thus, a court cannot infer from the fact of a violation that defendant's behavior has caused plaintiff any injury." *Id.* The foregoing statement suggests that the Court is in agreement that a trier of fact can generally infer from the fact of a Sherman Act violation that defendant's behavior has injured plaintiff.

As stated earlier, the opinions of the court below in this and the Fourth, Fifth and Eighth Circuits referred to *supra* illustrate that the courts of appeals are con-

fused and divided on the proof of impact standard, particularly in market exclusion Sherman Act cases. The division and confusion, however, is not limited to market exclusion cases or to the aforementioned courts of appeals. The Ninth Circuit, for one, has traditionally held that from the fact of certain Sherman Act violations, proof of impact is virtually automatic. In *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 713 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960), an exclusive dealing case under Section 1 of the Sherman Act and Section 3 of the Clayton Act, that court declared that "having shown the illegal restraint applied to its product, [plaintiff] had proved the causal connection between the defendant's wrongful act and the loss of revenue." *Id.*

In *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), the court held that "[e]vidence that a merchant has been required to pay more for goods which he resells is sufficient to establish, prima facie, that he has been damaged; such proof is adequate to 'establish with reasonable probability' that profits on resale were less." 327 F.2d 459, 471. The court also noted that "where a violation adversely affects the market in which the plaintiff must buy or sell 'the mere unlawful combination over a period of time to eliminate competition is proof of damage.'" *Id.* at 471 n.31 *quoting Fox West Coast Theatres v. Paradise Theatre Bldg. Corp.*, 264 F.2d 602, 608 (9th Cir. 1958).

Again in *Knutson v. The DAILY REVIEW, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), the Ninth Circuit, citing *Story Parchment, supra*, stated that "[p]roof of the fact of damage is closely intertwined with proof of causation." Quoting *Zenith, supra*, for the rule that a plaintiff must show *some* damage, the court observed "[e]ven as to this minimal quantum of injury, the standard is relaxed; otherwise, it would defeat the loose standard applied even to the amount of damages in antitrust cases." 548 F.2d

795, 811 (citation omitted). Applying the above standard to the maximum resale price fixing conspiracy proved by the plaintiff, the court allocated the burden of proof as follows:

> Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. This assumption merely amounts to a recognition that a "restraint" in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior.

Id. at 812 (footnote omitted).

The Third Circuit expressed a similar view in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), a tie-in case involving gas station operators. There, the court stated that:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would have obtained in a competitive regime, an individual plaintiff could prove fact of injury by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.

561 F.2d 434, 455. *Accord: State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 324 (5th Cir. 1978) (In factually simple price fixing cases " 'impact' and 'buyer' become almost synonymous"). *See also Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

The use of contradictory standards of impact proof is underscored by contrasting the decisions in *Malcolm v. Marathon Oil Co.*, *supra*, and *Wilder Enterprises, Inc. v.*

Allied Artists Pictures, supra, with those in the court below and in *Admiral Theatre Corp. v. Douglas Theatre Co., supra.*

In *Malcolm,* as in this case, the plaintiff alleged a concerted refusal to deal. Although the Fifth Circuit did not attempt to find such a violation, it assumed that one had existed and rendered its analysis of injury as if a boycott had in fact taken place. The plaintiff admitted contacting several gasoline suppliers who had refused to deal with him. However, he also admitted there were other suppliers known to him that he had not contacted. In a general discussion of impact proof, the court noted that "[i]n cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage, is not great. Indeed, one court has found it to be virtually nonexistent [quoting *Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp., supra*]." 642 F.2d 845, 855 n.19.

The *Malcolm* court then moved from the general to the specific. Initially, it indicated disagreement with the proposition that "a plaintiff seeking to recover damages because of an unlawful refusal to deal, must show a lack of an alternative supply." *Id.* at 863. Nevertheless, the plaintiff must attempt to mitigate his damages by trying to locate alternative suppliers. Failure to try or, alternatively, success in locating such suppliers does not negate impact, it simply minimizes the amount of the plaintiff's damages.

> [Plaintiff] may still be injured if he would have been better off without the refusal, but the amount of damage would be reduced . . . . [*T*]*he "burden of showing that the victim of tortious conduct failed to minimize his damages rests with the wrongdoer."* . . . The defendants did no more than establish that Malcolm failed to contact a few known suppliers of gasoline. They did not establish that those dealers could or

> would have sold Malcolm the needed product in sufficient quantities to keep his business alive . . . .

Id. (emphasis added).

The court concluded its discussion by declaring that if the burden were on plaintiff to disprove the existence of alternative suppliers, that burden would be so rigorous as to impede recovery.

> Requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery. The greatest burden that reasonably could be placed on him would be the burden to show the reasonableness of his mitigation efforts. And even if Malcolm had that burden . . . he had met [it] . . . . This proof consisted of Malcolm's testimony that his numerous calls to gasoline suppliers failed to secure him any gasoline.

Id.

The court below in this case, on the other hand, declined to review the evidence proffered by the petitioner as to the nature, intent, and probable consequences of the concerted refusal to deal. Moreover, it is fair to say the court refused to assume the truth of the petitioner's allegations concerning the violation. Rather, the court narrowly focused on the evidence of damages; specifically the evidence of the petitioner's failure to contact known suppliers after several suppliers had refused to deal with him. Without requiring the respondent to proffer any substantiating evidence that the known suppliers whom petitioner failed to contact "could or would have sold [the petitioner] the needed product in sufficient quantities . . ." (*Malcolm, supra*) during the period when several suppliers refused to deal with him, the court of appeals concluded that the petitioner had failed to meet his burden of proving impact. Thus, as distinguished from *Malcolm*, the court foisted on petitioner the entire burden of *disproving* the availability of alternative supplies. More than that, in finding no injury, the court

never considered evidence of both the tendency of the violation to injure the petitioner's business and the decline in the petitioner's profits and values.

In *Wilder Enterprises, Inc. v. Allied Artists Pictures, supra,* the Fourth Circuit reviewed a lower court's directed verdict against a motion picture exhibitor who claimed he had been deprived of the ability to acquire first-run films by a conspiracy among motion picture distributors and exhibitors pursuant to which they "split" first run films between the conspiring exhibitors.

The lower court had said that the plaintiff relied on two theories to prove the fact of injury: (1) demand prerequisite theory and (2) comparative theater or futility theory. With respect to the first theory, the lower court ruled that:

> Even if this evidence [of preferential] treatment were presented, there can be no conclusion drawn unless plaintiff can show it requested and was denied similar treatment. [*Citing Admiral Theatre Corp., supra.*]
>
> * * * *
>
> As a prerequisite to this approach . . ., plaintiff must show it bid or attempted to negotiate to get each film it claims it did not receive due to defendants' unlawful action and that it was unjustifiably denied those films.

1978-2 Trade Cases ¶ 62,886 at 79,131.

Regarding the futility theory, the lower court observed that "the records show . . . that during the critical years when plaintiff was developing a feeling of futility, a large percentage of the films it played was licensed from distributor defendants." *Id.* at 79,132. The lower court also noted that there was no evidence, other than the plaintiff's testimony, from which the jury could determine that the films he received were inferior to those awarded the conspiring exhibitors. *Id.* Accordingly, the court directed a verdict for lack of any proof of injury.

In reversing and remanding the district court decision in *Wilder*, the Fourth Circuit focused its attention upon the evidence of violation. It found evidence that independent exhibitors had been denied access to the split; one such exhibitor had even begged to be allowed to participate in the split; and the plaintiff's owner had testified he could not get first-run films the way the system had operated. From this evidence of the violation and its probable consequences, the court stated that the jury could infer that Wilder's bidding would have been futile. 632 F.2d 1135, 1142-1143. The court also had little difficulty finding that injury could have been inferred from the split. The court stated: "Most first-run films were licensed as split. Independent exhibitors were excluded from the split and denied access to many of these films. After the split started in 1971, Wilder had difficulty obtaining these films, its profits decreased, and eventually its theaters closed." *Id.* at 1142.

The *Admiral Theatre* case bore a close factual similarity to *Wilder*. Yet the Eighth Circuit refused to consider the natural tendency of the split to injure the plaintiffs. The court acknowledged that the failure of the plaintiffs to receive first-run films may constitute a part of the fact of injury. Nevertheless, the court insisted upon plaintiffs showing evidence (which did not exist) that they attempted to secure each picture they had not received and that their failure to obtain it was attributable to the split. The court explained its reasoning as follows: "One cannot show 'fact of injury' by alleging he did not receive something when he initially never tried to obtain it. Thus, the 'demand prerequisite' is also inherently necessary in showing damages, plus the causal connection of those damages to the split activities." 585 F.2d at 893-94 (citations omitted). As was true in the case below, the *Admiral Theatre* court,

in determining impact, imposed the additional burden on the plaintiffs of showing that for each product they had not received, they had made a demand, the demand was rejected, and it was rejected due to the claimed antitrust violation.

The impact standard used by the court below and the Eighth Circuit is unduly rigorous by comparison to the standard articulated by the Court and used in at least the Third, Fourth, Fifth and Ninth Circuits. Such a rigorous standard ignores, indeed reverses, "[t]he constant tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done." *Bigelow v. RKO Radio Pictures, Inc., supra* at 265.

The Court should grant the petition for a writ of certiorari to resolve the conflict among the courts of appeal and clarify the law on a significant question going to the heart of effective private antitrust enforcement.

2. In *J. Truett Payne Co., Inc. v. Chrysler Motors Corp., supra*, the Court purposefully abstained from making a determination of the sufficiency of plaintiff's evidence of impact and damages. The stated reason for this abstention was the failure of the lower court to make a finding of violation, thereby preventing the Court from applying the "traditional rule excusing plaintiffs from an unduly rigorous standard of proving antitrust injury," 451 U.S. 557, 101 S.Ct. 1923, 1929, when a violation has been proved. Unstated, but implicit in both the majority and dissenting opinions, is the recognition that proof of violation is an absolute prerequisite to determining impact. The nature of such proof alone makes possible a determination whether (a) the defendants' acts tended to injure plaintiff and (b) evidence of plaintiff's decline in prices, profits or values could reasonably be attributed to such acts. This is the tradi-

tional rule for demonstrating impact. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra; Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra.*

In this case, the court below bypassed the issue of violation declaring it to be unnecessary to its analysis of impact. On the same day the court rendered its initial opinion herein, it also bypassed the violation issue in another decision in which it held the plaintiff had not proved fact of injury. *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982). The court of appeals' practice of bypassing the issue of violation and turning immediately to the question of injury is at odds with the clear command of the Court in *Truett Payne* and the rationale behind the command. In every modern antitrust case decided by the Court in which the question of injury and damage has come into play, the review has begun with an analysis of the evidence of violation. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra; Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra.* The overwhelming majority of courts of appeals have followed the same practice. *See, e.g., Malcolm v. Marathon Oil Co., supra; Wilder Enterprises, Inc. v. Allied Artists Pictures, supra; Richfield Oil Corp. v. Karseal Corp, supra.* Some courts have listed in order of priority of proof the elements of a private antitrust action: (1) violation, (2) impact, and (3) amount of damages. *See Windham v. American Brands, Inc., supra,* and *State of Alabama v. Blue Bird Body Co., Inc., supra.* The listing of these elements might suggest that each one must be addressed in isolation, and the absence of any one is fatal to the plaintiff's case. Unless the elements are analyzed in exact order of their priority, however, this approach is bound to deprive the plaintiff of the benefit

of all his proof and the reasonable inferences which flow from such proof. The soundness of following these priorities lies in the certainty that until the evidence of violation has been sifted, it is impossible to fully appreciate its effects upon competition and also competitors, suppliers or customers. This was the general implication of *Blue Shield of Virginia v. Carol McCready*, —— U.S. ——, 102 S.Ct. 2540 (1982), where the Court addressed a group boycott which, though directed at excluding psychologists from the market, also injured Blue Shield subscribers.

The congressional objective in enacting the antitrust laws was to promote and preserve a free marketplace consisting of many competitive units, leading inevitably to lower prices, increased quality and better service. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958). A concerted refusal to deal with customers and potential competitors, if permitted to persist, is calculated to destroy these national objectives. Competition on the basis of price and service is stifled, even if a few members of the combination surreptitiously break ranks. For that reason, boycotted customers are perforce deprived of the benefits of open competition.

In setting adrift the fact of violation in this case, it was impossible for the court below to gain any appreciation whatsoever as to whether the violation had a tendency to injure the petitioner and competition generally.[10]

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[10] The district court instructed the jury that this case was governed by the rule of reason and that in order to render a verdict for petitioner, the jury must find that the alleged violation suppressed competition and also injured petitioner. (T.R. 3284, 3288-3289) Although the district court did not give a *per se* instruction, the cases hold that when a market exclusion policy is implemented as part of a price fixing scheme, it is governed by the *per se* rule which conclusively presumes injury to competition. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

In a market characterized by open competition, as opposed to collusion, would delivery times have been reduced? Would wider assortments and larger quantities of products have been available? Would one-stop service at closer locations have been available? These are questions, the answers to which can only be found by addressing the fact of violation. And, without answers to these questions a determination of injury or its absence is purely guesswork.

To be certain, avoidance of the question of violation saves time, but this saving is at great expense to the antitrust plaintiff and to private enforcement of the antitrust laws. As the Court said in *Blue Shield of Virginia v. Carol McReady, supra*: "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" —— U.S. ——, 102 S.Ct. at 2549 (citations omitted).

The writ of certiorari should be granted to examine a radical departure from the sound rules announced by the court for determining injury in Sherman Act cases.

3. In *Glasser v. United States*, 315 U.S. 60 (1942), the Court laid down the general rule that on appeal from a judgment based upon a jury verdict both verdict and judgment will be sustained when they are supported by substantial evidence in the record. In *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, the Court reiterated that the authority of an appellate court when reviewing the findings of a jury "is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S. 100, 123.

It is axiomatic in the law of civil procedure that the reviewing court must view the record and reasonable inferences to be drawn from it in the light most favorable to the non-moving party. *Galloway v. United States*,

319 U.S. 372 (1943). This applies to review of a favorable judgment as in this case although it also applies to the granting of a directed verdict, judgment notwithstanding the verdict or summary judgment. In this connection, the plaintiff in an antitrust suit must be given the benefit of all his proof. Thus, the reviewing court must "look at the whole picture and not merely at the individual figures in it." *Continental Ore Co. v. Union Carbide & Carbon Corp., supra* at 699. The portion of the evidence a court is to consider is not settled. Some courts of appeals have held that the prevailing party is entitled to rely upon evidence most favorable to its position. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967); *Richfield Oil Corp. v. Karseal Corp., supra.* However, other circuits have different practices. *See generally* the discussion of the conflict among the circuits on this issue in the Honorable Justice White's dissent to the denial of a writ of certiorari in *Schwimmer v. Sony Corp. of America*, —— U.S. ——, 103 S.Ct. ——, 1089 ATRR 906 (Nov. 8, 1982).

With respect to proof of injury in antitrust cases, the Court has admonished lower courts to "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123.

The court below in this case gave no credit to the ample evidence of an organized boycott of unauthorized dealers (including petitioner) by authorized dealers and the respondent; to the petitioner's testimony that those few authorized dealers who had breached the boycott did not carry sufficient stock in respondent's equipment to fulfill the demand of petitioner's customers; and to testimony that petitioner had suffered delays in obtaining

such equipment from them, particularly with regard to replacement parts. Finally no credit was given to circumstantial evidence from which the jury could reasonably have inferred that the petitioner's decreased sales of serial-numbered equipment were due, at least in material part, to the respondent's practice of tracing back to the originating dealer serial numbers on equipment sold to unauthorized dealers. Significantly, the court did not even consider the petitioner's substantial evidence of declining sales and profits from the sale of respondent's equipment after the boycott had become effective. By contrast, the court fully credited the bare, uncorroborated deposition statements of some authorized dealers who said they would have sold equipment to the petitioner if he had called them. Yet there was no evidence of record that they could or would have filled the petitioner's orders during the period when several dealers had refused to sell to him. Nor was there any evidence that the petitioner's declining sales and profits were attributable entirely to causes unrelated to the boycott.

Thus, it is evident that the court of appeals attached greater weight to the testimony of a few dealers who themselves were ostensibly members of the conspiracy than it did to petitioner's evidence. Moreover, the court ignored the teaching of the Court that where the defendant's wrongful acts have a tendency to injure plaintiff's business and there has been a decline in prices, profits or values not attributable to other causes, the trier of fact is entitled to infer the fact of injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra* at 123; *Bigelow v. RKO Radio Pictures, Inc.*, *supra* at 264. The jury made this inference.

The Court should grant certiorari in this case to resolve a basic question concerning the proper method of weighing the sufficiency of evidence in antitrust cases and more specifically in market exclusion cases in which the question of fact of injury has been raised.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the opinions and judgment of the court of appeals.

Respectfully submitted,

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